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Nos. 84-237, 84-238, and 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellants,

and YOLANDA AGUILAR, and LILLIAN COCON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Appellants-Intervenors,

vs.

BETTY LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELLON,

Appellees.

On appeal from the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF PARENTS RIGHTS, INC., AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF PARENTS RIGHTS, INC., AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

Parents Rights, Inc. respectfully moves for leave to file the accompanying brief as amicus curiae in support of Appellants. Written consent of Counsel for the parties has been requested but has not been received.

Parents Rights is a national organization consisting of over 20,000 parents and other individuals residing in all fifty states who seek to support and promote freedom of choice and paren-

tal rights in education. The group's stated purposes are "to secure legal recognition for the right of parents to direct and control the education of their children; to secure true freedom of choice for parents in the education of their children; to undertake and support court action to achieve their goals; to publish literature and other materials to awaken the public to the denial of the human rights of the family in education."

Members of Parents Rights are concerned with supporting the natural and constitutional "right coupled with the high duty" of parents to "direct the upbringing and education of children under their control," with due deference to the interest of the state in this important field. In this connection they are also concerned with the implications of this parental right and obligation for governmental encouragement, support, and regulation of education.

Members of Parents Rights, Inc., are concerned about the present case because it ultimately threatens the right and ability of parents to direct the education of their children. The case challenges the rights of parents and their children to share comparably and equitably in the benefits of general federal legislation promoting education if they attend schools other than governmental schools. A contrary decision would not only deprive such children of needed educational benefits, but would also be another pressure on parents to abandon their right to send their children to schools they consider best for them.

BRIEF AMICUS CURIAE FOR PARENTS RIGHTS, INC.

INTEREST OF AMICI

The interest of the amici in the instant litigation is set forth in the accompanying motion to file this brief.

PREFACE

Gratitude is expressed to Professor Emeritus Daniel D. McGarry and Robert J. Wittmann, as well as to the Thomas J. White Foundation for help with this brief.

SUMMARY OF ARGUMENT

The limited contacts of government with church-related schools in the New York application of Title I of the Elementary and Secondary Education Act do not constitute excessive entanglement of government and religion. Excessive political entanglement is absent because of a broad class of beneficiaries and the absence of financial subsidization. Excessive administrative entanglement is absent because of the features and circumstances of the program, as well as because of the educational rights of parents and students being protected and the advanced degree of socialization of education.

The purpose of the prohibition against excessive administrative entanglement, as explained by this Court, is to protect religion against governmental interference and inhibition. Opponents maintain that on-premises instruction of students in non-public schools by public employees is unconstitutional because government must either run a serious risk of having public employees inculcate religion in church-related schools, or exercise extreme surveillance over church-related schools to avoid this possibility. Either alternative would be unconstitutional, as the first would seriously risk an establishment of religion, and the second would seriously threaten free exercise of religion, according to opponents.

The features and circumstances of the New York application of Title I as well as common sense and experience show that neither is there any serious likelihood of substantial effective inculcation of religion by public employees of various persuasions rendering remedial services in private schools, nor is extreme surveillance of the schools or their employees present or required. The existing supervision, which is sufficient, is of public school employees by public school employees, and is no more nor less that that which should be required to prevent inculcation of religion in public schools. Contacts between public school employees and private school employees are minimal; and the contacts of government with the church-related institutions are no more than many already existent necessary contacts of government with such institutions.

The constitutional rights of parents and children require that considerable contacts between government and church-related schools and their users be allowed. Many personal rights are implemented by voluntary private institutions, including church-related ones. Disallowing general benefits because of the exercise of such rights, especially when such benefits have been legislated by Congress, would penalize the exercise of constitutional rights without a substantial and compelling reason.

The increasing socialization of our elementary and secondary education, according to the principle "From each according to his means; to each according to his needs," also requires allowance of considerable contacts between government and private educational institutions, such as church-related schools, if personal freedoms are to survive.

ARGUMENT

I. The involvement of government with religion in the application of Title I of the Federal Elementary and Secondary Education Act of 1965 (20 U.S.C. §2701 *et seq.*), by the New York City Board of Education does not result in excessive entanglement between government and religion in view of its features and circumstances.

A. Only "excessive entanglement"—not all contact and relationship between government and religion—is forbidden by the Religion Clauses of the First Amendment.

The excessive entanglement test for the constitutionality of relationships between government and religion was clearly enunciated and explained by this Court in *Walz v. Tax Commission,* 397 U.S. 664 (1970) at 668-669 and 674, and in *Earley v. Di Censo,* and its companion case *Lemon v. Kurtzman,* 403 U.S. 602 (1973) at 612-613 and 616-620. The test has been applied in these and other cases, such as *Meek v. Pittenger,* 95 S.Ct. 1753 (1975) at 1764-1767 without substantial elaboration of its basic principles and assumptions.

In stating the excessive entanglement test, this Court said, "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." The Court then went on to add: "The test is inescapably one of degree." *Lemon v. Kurtzman,* as cited, at 674.

The statement of the excessive entanglement test in both *Walz* and *Lemon* was prefaced by an explanation of the First Amendment purposes it was meant to defend. With reference to the purpose of the Establishment Clause of the First Amendment and this test, the Court in *Walz v. Tax Commission* said that "for the men who wrote the Religion Clause of the First Amendment, the 'establishment of a religion' connoted sponsorship, financial support, and actual involvement of the sovereign in religious activity." *Walz v. Tax Commission,* as cited, at 668.

Consistently with this, this Court in *Lemon v. Kutzman* listed as the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " (Citation omitted.) *Lemon v. Kurtzman,* as cited, at 612.

With reference to the general principle guiding application of the Religion Clauses and its corollary excessive entanglement test this Court said: "The general principle deducible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion." The Court then added: "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality." *Walz v. Tax Commission,* 397 U.S. 664 (1970) at 669.

Applying this to the excessive entanglement test, this Court has said: "Each value judgment under the Religion Clauses must, therefore, turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices, or have the effect of doing so. Adherence to the policy of neutrality that derives from an accomodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." *Walz v. Tax Commission,* as cited at 669-670.

The foregoing statements of the purpose of avoiding excessive entanglement of government with religion emphasizes protection of the religious freedom of citizens and their churches, and relate mainly to avoidance of what has come to be called administrative entanglement (see below). This was further expanded in *Lemon* to include avoidance of political entanglement, which emphasizes protection of the body politic or state against excessive intrusion of religion and churches into political processes. The latter seeks to avoid serious political division along religious lines. *Lemon v. Kurtzman,* as cited, at 622-624.

Since this particular form of excessive entanglement does not seem to be especially at issue in the present case, our principal attention is focused on general and administrative entanglement.

The purposes of non-entanglement as explained by this Court are mentioned here inasmuch as they can easily be lost sight of so that the test is misapplied. According to the Court's explanation, the main purpose of avoiding excessive general and administrative entanglement is to protect religion and churches, while that of avoiding excessive political entanglement is to protect the state. (See above.)

In explaining the excessive entanglement doctrine, this Court has made clear that not all contact and involvement of government with religion is prohibited—only *excessive entanglement.* Thus in *Walz* the Court, quoting Mr. Justice Douglas writing for the Court in *Zorach,* said: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.' *Id. (Zorach v. Clauson,* 343 U.S. 306 (1952)) at 312." *Walz v. Tax Commission,* as cited at 669. After saying that, "we will not tolerate either governmentally established religion or governmental interference with religion," the Court as previously mentioned, added: "Short of these expressly proscribed governmental acts, there is room of play in the joints productive of a benevolent neutrality...." *Walz v. Tax Commission,* as cited at 669. Regarding the excessive entanglement test itself, the Court admonishes us that, "The test is inescapably one of degree."

This Court has also explained that the degree of general or administrative involvement of government with religion that would be excessive would be one, "that would tip the balance toward government control of churches or governmental restraint on religious practice." *Walz v. Tax Commission,* as cited, at 669-670. Such excessive involvement has also been described by this Court as "intrusion" or as extreme, unwarranted, and resented entry of either church or state "into the

precincts [or affairs] of the other." *Lemon v. Kurtzman* as cited, at 614; *Lynch v. Donnelly,* 104 S.Ct. 1355 (1984) at 1358.

It may be seen from the foregoing that the principle confusion which may arise in applying the excessive general or administrative entanglement test is to conceive of it as a protection against an establishment of religion. According to the explanations of this Court discussed above, the purpose of the general or administrative entanglement test is to protect religion and churches from excessive government interference; while that of the political non-entanglement test is to protect the body politic from extreme division over religious issues. Accordingly, the principle of non-entanglement does not include protection against establishment of religion, which is presumably to be left to the purpose and primary effect tests, which are better adapted to accomplishing this in a just and equitable manner.

Based on discussions of this Court, excessive entanglement is usually divided into two kinds; administrative and political. *Lemon v. Kurtzman,* as cited, at 614-620 and 622-623; *Roemer v. Board of Public Works,* 426 U.S. 736 (1976) at 748-750; Jesse H. Choper, "The Religion Clauses of the First Amendment" in 41 *University of Pittsburgh Law Review,* 673 (1980) at 678-685; Kenneth F. Ripple, "The Entanglement Test of the Religion Clauses..." in 27 *U.C.L.A. Law Review,* 1195, (1980) 1195-1208. Since the absence of excessive general or administrative entanglement in the New York application of Title I is the main concern of this brief, we will first briefly discuss the absence of excessive political entanglement.

B. Excessive political entanglement between government and religion is not engendered by the New York application of Title I.

According to this Court, excessive political entanglement is that degree of involvement of religion and politics which threatens to bring about undesirable political division among citizens along religious lines. Also, according to the Court, such

extreme division may arise when there is a question of providing governmental financial assistance for church-related education. Further, according to the Court, such division was one of the evils which the First Amendment sought to obviate. *Lemon v. Kurtzman,* as cited at 622-623.

Such excessive political entanglement and extreme divisive political potential is absent in the present application of Title I because of the broad class of beneficiaries that includes disadvantaged public school students as well as disadvantaged private school students, and benefits many more (over seven times) of the former than of the latter. *Felton v. Secretary, United States Department of Education,* 739 F.2d 48 (1984) at 51. Rather than being a cause of division, the inclusion of private school students has been a factor for unity and was actually one of the features that promoted general acceptance and passage of the original legislation.

As a result of the broadness of the legislation, there has been no evidence of its resulting in political division for religious reasons in the several years since its original passage in 1965. Political division is also avoided because the federal entitlement program does not come up for annual renewal—one of the disrupting difficulties of the legislation at bar in *Lemon-Earley. Lemon v. Kurtzman,* as cited, at 623-624.

A further factor favoring political peace concerning Title I and its application in the City of New York is the fact that the federal subsidization is directed to a public school district and its employees, and it does not involve any direct subsidization of private and church-related schools and/or teachers. Furthermore, the services are also rendered to and directly benefit the disadvantaged children themselves rather than the schools.

Finally, this Court has twice declared that a serious danger of excessive political entanglement in such cases arises only in the event of direct financial payments or reimbursements to church-related schools or their teachers: this limitation was mentioned in *Mueller v. Allen,* 103 S. Ct. 3062 (1983) at 3071, n. 11, and

was repeated and confirmed in *Lynch v. Donnelly,* 104 S.Ct. 1355 (1984) at 1364-1365.

C. Several important features and circumstances contribute to prevent excessive administrative entanglement of government with religion in the application of Title I of the Elementary and Secondary Education Act in New York City.

Opponents of New York's application of Title I of the Federal Elementary and Secondary Education Act argue that it results in a dilemma for government, either response to which would be unconstitutional. On the one hand, if the government does not provide for "comprehensive, discriminating, and continuing surveillance and controls," it runs a serious risk of subsidizing an impermissible fostering of religion. On the other hand, if the government does provide such extreme surveillance and controls it becomes engaged in excessive entanglement with religion which seriously threatens the independence and freedom of religion. Either course, according to the argument would violate the Religion Clauses of the First Amendment.

It should first be observed, as has been noted above, that "excessive involvement" is relative: "a matter of degree," *Walz v. Commission,* as cited at 674; *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426. Dependent on all the circumstances, this relativity and allowable degree is also in relation to the various factors, such as personal rights and public interests involved. With specific reference to entanglement, this Court has noted that, "the line of separation" is a "variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman,* as cited, at 614. With regard to "on premises" instruction by public teachers, the Court, implying consitutionality at least under certain conditions, has noted that, "The First Amendment implications may vary according to the precise contours of the plan formulated." *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426. This Court has also said: "The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved a difficult

one . . . Usually it requires a careful evaluation of the facts of the particular case . . . . A federal court does not sit to render a decision on hypothetical facts . . . ." *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426-427 (citations omitted).

Emphasizing the extreme nature of the degree of general and administrative entanglement between government and religion that would make relations between them suspect of being unconstitutional, this Court has said that it would be, "that kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice." *Walz v. Tax Commission,* as cited, at 669-670.

We will show that neither "horn" or alternative of the dilemma mentioned above—impermissible fostering of religion or its inhibition by extreme surveillance—is fulfilled, necessitated, or gravely threatened.

1. The involvement of government and religion in the New York application of Title I does not incur a serious risk of an impermissible fostering of religion. In order to be constitutionally disabling, fears must be reasonable and well grounded and risks must be grave and real. Exaggerated fears and minimal risks or mere possibilities are not enough. As this Court has said, "the measure of constitutional adjudication is the ability to distinguish between real threat and mere shadow." *Marsh v. Chambers,* 103 S. Ct. 3330 (1983) at 3337. This Court has also said: "A possibility always exists, of course, that the legislative objectives of any law or legislative program may be subverted by conscious design or lax enforcement...but judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton v. Richardson,* 403 U.S. 672 (1971) at 679 (plurality opinion).

According to the unanimous decision of the three-judge District Court in *National Coalition for Public Education and Religious Liberty v. Harris,* 489 F.Supp. 1248 (1980), the church-related schools involved in the New York program are not pervasively sectarian in the way and to the degree attributed

to the Rhode Island schools in *Lemon v. Kurtzman - Earley v. DiCenso,* (as cited, at 615-618); the equipment and material provided are used and controlled solely by the public school personnel; all religous symbols are removed from the classrooms; the financial assistance provided by the federal government goes directly to the public board of education and its employees for instruction and services for disadvantaged students; no financial subsidy is provided for the private schools or their personnel; the only supervision and surveillance involved or necessary is of public school employees by public school personnel; actual contacts between public school personnel and private school personnel are limited, minimal, and routine; and the program in the past 14-17 years has not engendered any impermissible inculcation of religion at public expense or any excessive entanglement between state and church.

National Coalition for Public Education and Religious Liberty v. Harris, 489 F.Supp. 1248 (1980), appeal dismissed for want of jurisdiction *sub nom. National Coalition for Public Education and Religious Liberty v. Hufstedler,* 449 U.S. 808 (1980): 489 F. Supp. 1248 (1980) at 1262-1264 and 1267-169. Evidence in the case thus demonstrates the absence of serious potential for excessive entanglement and impermissible fostering of religion by public school personnel entering private church-related schools is further shown by the following:

The change in the character of church-related schools themselves in recent years (apart from the ingress of public school teachers in the application of Title I) is illustrated by the fact that nationwide, whereas in 1960 the proportion of religious teachers (nuns, brothers, and priests) to lay teachers was about 2 to 1, by 1982 it was 1 to 2. *Statistical Abstract of the United States: 1984* (U.S. Bureau of the Census, 104th ed., 1983) at 156.

This is but one aspect of the reduction of the supposed "pervasively religious atmosphere" penetrating every subject in these schools when taught by their own regular teachers.

The nature of the public teachers employed and professionals coming into church-related schools for remedial work in the application of Title I make it highly unlikely that they will seek to inculcate the religion of the school, or maintain a "pervasively religious atmosphere in their classes. About three-fourths (73.5%) of the public teachers coming into the private schools in the New York application of Title I are of faiths different from that of the schools in which they are teaching; and about three-forths (78%) of them are also itinerant. *Felton v. Secretary,* as cited, 739 F 2d 48 (1984) at 53 and J.A. 44-45. The public teachers and professionals have been given detailed instructions calculated to prevent them from injecting any religion into their teaching and services. They are also regularly supervised by public school supervisors to see that they are observing these restrictions. (JA 45-51); *Felton v. Secretary,* as cited, at 53; and *National Coalition for P.E.A.R.L. v. Harris,* as cited, at 1267-1269. Evidence shows that the regulations have been strictly observed and no known violations on the part of the public employees have occurred in the several years of the existence of the program. *National Coalition for P.E.A.R.L. v. Harris,* as cited, at 1267-1268. *Felton v. Secretary,* as cited, at 53-54.

It is difficult to see how and why public teachers would violate their instructions and commitments to try to inculcate the religion of the sponsoring bodies of the schools wherein they teach when they would be needlessly violating these instructions and commitments, be risking their position and professional standing with the School Board, be injecting religion in an illogical, incongruous, and even ridiculous manner into unrelated subjects and services, and would in most cases be inculcating religious views other than their own or religious doctrines concerning which they had insufficient knowledge.

The situation with regard to the teachers applying Title I in New York is in marked contrast to the original situation with regard to the religious teachers in the Rhode Island schools, which apparently prompted the excessive entanglement doctrine

in *Earley v. DiCenso - Lemon v. Kurtzman,* as cited above, which situation was projected into subsequent cases such as *Meek v. Pittenger,* also above cited. 95 S.Ct. 1753 (1975). In *Earley - Lemon* "approximately two-thirds" of the teachers in the church-schools were "nuns of various religious orders" *Lemon v. Kurtzman,* as cited, at 615. The teachers therein were teaching a variety of secular subjects, some of which could possibly lend themselves to supporting a certain religious viewpoint. The preponderance of nuns in the Rhode Island schools enhanced the "religious atmosphere" of the latter according to the Court. *Id.,* at 615-617. It was apparently mainly of such teachers that the Court surmised that "a dedicated religious person, teaching in a school affiliated with his or her faith, and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id.* at 618.

The subject matter taught and services rendered by public school personnel do not really lend themselves to the inculcation of religion — at least to its effective inculcation. No one has never shown how such subjects as remedial reading, remedial English, and remedial mathematics can be made fertile fields for effective religious inculcation or how they can participate in religious pervasion. Common sense and the ordinary experience of both students and teachers dictate and testify otherwise. It would be illogical, incongruous, ridiculous, and almost certainly unproductive—even counterproductive—for public employees to drag religion into purely secular remedial courses and services.

The terms "religious atmosphere" and "pervasively religious instruction" have often been applied to church-related schools in a somewhat *a priori* manner. But the supposed "religious atmosphere" of church-related schools and its degree and implications are often assumed or exaggerated. Public school teachers and other professionals in the New York application of Title I testified that they did not perceive "a dominant sectarian mission" in the church-related schools wherein they taught. *National Coalition for P.E.A.R.L. v. Harris,* as cited, at 1263.

Allegations of a "predominant" or "pervasive religious atmosphere" are based mainly on two things: the asserted sole or main purpose for the foundation and maintenance of the church-related schools, and the preponderance of dedicated religious persons in the schools. *Lemon v. Kurtzman,* as cited at 615-616; and *Meek v. Pittenger,* as cited, at 1758-1759 and 1764-1765. Mention is also made of such things as the presence of religious symbols and frequent proximity of a church or chapel, although the influence of the latter would seem to be comparatively minor.

As has been seen, the "religious atmosphere" of church-related schools as far as the preponderance of religious persons (nuns, brothers, and priests) is concerned has radically declined in the last two decades. Today the situation is reversed, with a preponderance of lay persons and the trend seemingly continuing. *Digest of Education Statistics, 1983-4* as above cited, at 156.

As far as the predominant purpose of the foundation and maintenance of church-related schools is concerned, it is safe to say that in colonial times, when such schools were the main and practically exclusive educational institutions on all levels, they were founded as much (perhaps even more) for secular as for religious education.

It has been alleged repeatedly that church-related schools are so pervasively religious with such a dominant "religious mission" in them that secular and religious instruction are "inextricably intertwined" because "the religious mission" is the only reason for the church-related school to exist. See, v.g. *Meek v. Pittenger,* as cited, at 1758-1759 and 1764-1765. Besides the fact that this is an exaggeration, a characterization of the essential and pervasive nature of these schools based on a partial motive for their founding confuses a leading motive of their founders with the full nature of their product. Many Christians seek to follow the injunction of St. Paul: "Whether you eat or drink or whatsoever else you do, do all for the glory of God." I

Cor., 10:31. But a religious motive or intention does not change the essential nature of their acts such as eating and drinking from being physical and secular to being essentially religious. If it did, the provision of social security payments to them for such purposes might be unconstitutional. Despite such motives and intentions, by far the principal activity of church-related schools is provision of secular instruction in secular subjects, even though they have been founded and may be maintained partly or mainly to insure the inclusion of adequate religious instruction in the education of children.

2. The surveillance or supervision maintained and required over public school personnel providing remedial instruction and services in church-related schools in the application of Title I in New York does not result in excessive entanglement of government and religion.

The existing supervision of public school personnel providing remedial instruction and services in church-related schools is not intense and does not result in excessive entanglement of government with religion. It is not that kind of excessive involvement "that would tip the balance toward government control of churches or governmental restraint on religious practives." *Walz v. Tax Commission,* as cited, at 669-670. The surveillance or supervision is limited to supervision of public school employees by public school employees, and does not extend to the church-related schools themselves or to their employees and instruction. There is no substantial relationship developed between government and religion. No further surveillance is required because of the unlikelihood of the public school employees engaging in religious instruction under the circumstances. There is actually less likelihood of public school employees communicating to their students in nonpublic schools their own religious convictions as to the general meaning of life and the best life than of their doing so in public schools where there are practically no precautions against this or monitoring in this respect. Whereas these same employees have very little supervision of their teaching in public schools insofar as such content is concerned,

in the church-related schools they have both instructions and supervision to avoid any inculcation of a religion or an outlook on and program for life. Excessive surveillance imperilling religious freedom is not required by the New York program because of the very remote possibility of unconstitutional inculcation of religion through it, and, even if it were to be required in whatever degree, such surveillance would not affect the teaching of religion in the church-related schools. Neither would it adversely affect the freedom of religion in the school or substantially diminish the latter's independence of government.

II. The right of parents to direct the education of their children allows and requires considerable contacts and involvement between government and church-related schools.

A. Parents have a right to direct the education of their children including use of church-related schools of their choice.

1. Parents have a constitutional right to direct the education of their children in schools of their choice.

This Court has several times affirmed the constitutional right of parents to direct the education of their children and protected and promoted the implementation of this right, as in *Meyer v. Nebraska,* 262 U.S. 390 (1923) at 400-402; *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) at 534-535; *Everson v. Board of Education,* 330 U.S. 1 (1947) at 18; *Griswold v. Connecticut,* 371 U.S. 479 (1965), at 510; *Minersville v. Gobitis,* 310 U.S. 586 (1940); *Prince v. Massachusetts,* 321 U.S. 158 (1944) at 166; and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) at 213-214.

In *Meyer v. Nebraska,* 262 U.S. 390 (1923) this Court upheld the natural and constitutional right of parents to determine and include courses of instruction, including the German language (at the time in disrepute), best calculated to prepare their children for their future life: The Court said:

"Corresponding to the right of control, it is the natural duty of the parent to give his children educaiton suitable to their sta-

tion in life....That the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally and morally is clear, but the individual has certain fundamental rights which must be respected." *Meyer v. Nebraska,* as cited, at 400-401. The Court went on to say: "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." *Id* at 402.

What has come to be a classic statement of the right of parents to direct the education of their children was made by this Court in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), in which the Court first reaffirmed the broad principle laid down in *Meyer (supra):*

"As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* as cited, at 534-535.

In *Griswold v. Connecticut,* 381 U.S. 479 (1965), Justice Douglas, writing for the Court reaffirmed the right of parents to direct the education of their children and associated it with the general rights of freedom of communication and information, also affirmed by the First Amendment, as well as with rights

prescribed by the Fourteenth Amendment: "By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska, supra,* the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut,* as cited, at 482.

In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), this Court went so far as to approve the excusal of Amish parents and their children from the obligation of compulsory education laws with regard to academic secondary education, upholding parental rights regarding, "the religious upbringing of their children" in order to "prepare (them) for additional obligations." *Wisconsin v. Yoder,* as cited, at 214.

The primary right of parents to direct the education of their children is also, incidentally, affirmed by the *Universal Declaration of Human Rights* of the United Nations, to which the United States is a signatory. Article 26, Section 3 of this *Declaration* says: "Parents have a prior right to choose the kind of education that shall be given to their children." United Nations, *Universal Declaration of Human Rights* (Reprint, 1981)

2. The right of parents to educate thier children in schools of their choice includes the right to have them educated in church-related schools that include religion along with secular subjects.

Originally most of the schools in this country were church-related schools which included religion along with secular subjects. These schools were supported by public subsidies as well as by private donations and fees paid by parents. Brickman, *Historical Background*. . . 1 Educational Freedom, ed. McGarry and Ward (1966), 6-8.

For some time, following the advent of public education as we know it, public schools continued to inculcate a general form of Protestant Christianity. But eventually the increasingly

heterogeneous nature of our communities has caused religious education to be excluded from public schools. *Id.*, 11-17.

Since the advent of free public education, many parents have continued to send their children to private church-related schools because of the features of the secular education provided in them as well as in order to provide their children with an adequate and effective religious education. This is still the dual purpose of the majority of nonpublic schools in the United States: to provide sound secular instruction accompanied by religion instruction.

In upholding the right of parents to direct the education of their children in several cases, this Court has incidentally upheld their right to educate them in church-related schools. This it has done both by not restricting the parental right in education, and also by favorably deciding cases involving church-related education and religious-oriented education, as in *Pierce v. Society of Sisters,* as cited above; *Prince v. Massachesetts,* as cited above; and *Wisconsin v. Yoder,* as cited above. In such cases, the Court has specifically referred to the right of parents to provide their children with a general education that includes religious along with secular education.

In *Prince v. Massachesetts,* 321 U.S. 158 (1944), the Court said:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* as cited, at 166.

3. The natural and constitutional right of parents to direct the education of their children is further supported by the First Amendment rights of free exercise of religion and freedom of communication and information.

a) This right is supported by the right of free exercise of religion.

To recognize the parental right to direct the education of their children in schools of their choice, but to deny them the right to send them to church-related schools which include religion in their curriculum along with secular subjects would be contrary to the First Amendment's prohibition against governmental inhibition of "the free exercise of religion" as extended to the states by the Fourteenth Amendment, according to *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

This Court in *Abington School District v. Schempp,* 274 U.S. 203 (1963), in speaking of the "wholesome neutrality" demanded of government by the Religion Clauses after referring to the Establishment Clause, says of the Free Exercise Clause, as applied to education:

> And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. *Abington School District v. Schempp,* as cited, at 223.

This Court also stressed governmental neutrality regarding religion and the teaching of religion in *Epperson v. Arkansas,* 393 U.S. 97 (1968) at 103.

It is obvious that freedom of parents to transmit their religion adequately to their children by general education that includes religion, as well as the right of their children to receive this education is an integral part of their constitutional right to a "free exercise of religion."

b) The right of parents to educate their children in church-related schools is further supported by the freedom of communication and information required by the First Amendment.

That the freedom of communication and information required by the First Amendment apply to education and its con-

tent, including religion, is confirmed by this Court in various cases.

As noted above, Justice Douglas, writing for the Court in *Griswold v. Connecticut,* above cited, noted that the general rights of freedom of communication and information affirmed by the First Amendment were associated with the right of parents to direct the education of their children, and concluded: "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut,* as cited, at 482.

This right of academic freedom is also forcibly proclaimed by this Court in *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), wherein the Court says:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' " (Citation omitted). *Keyishian v. Board of Regents,* 383 U.S. 589 (1967) at 603.

In *Board of Education v. Barnette,* 319 U.S. 624 (1942), this Court insisted on the same principle, saying: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *Board of Education v. Barnette,* as cited, at 641.

This right of choice "in politics, nationalism, religion, or other matters of opinion," with its associated right of choice of education, is left to individuals, and in the case of children it is rendered on their behalf by their parents.

4. The constitutional right of parents to direct the education of their children and have it include religion along with secular subjects is accompanied by a right of their children to receive this education.

In our society parents have a right to direct the education of their children and provide them with a general education that includes religion along with secular subjects. Most of the rights of minor children in our society are protected, asserted, and implemented for them by their parents. Among these rights of children is a right to receive an education that includes religion as well as secular subjects, if such is chosen by their parents. This right is ultimately based on the same foundations as the educational right of their parents.

B. The constitutional rights of parents and their children regarding education require allowance of considerable contacts and involvement between government and church-related schools, especially when participation in general educational benefits is legislated by Congress.

1. Congress has legislated, with this Court's approval, that children in non-governmental schools, including church-related schools, should share comparably with public school children in the educational benefits of the federal Elementary and Secondary Education Act.

In the Elementary and Secondary Education Act of 1965, as amended, Title I, 20 U.S.C. §2701 *et seq.* (1982) and the related Education and Consolidation Act of 1981, Chapter I, 20 U.S.C. §3801 *et seq.* (1982), Congress has legislated that children enrolled in private schools shall share equitably with children in public schools in the educational services provided by the Act, taking into account the number of disadvantaged students from low income families to be served and their needs. 20 U.S.C. §3806 (1982). To insure this equity, Congress has legislated that the expenditures and arrangements for such services shall be equal, taking into account the number and needs of the

children. *Id.* These provisions and requirements are further stated in the Regulations found in 34 C.F.R. §200 and 45 C.F.R. §116 (1983) which repeat and further expedite the requirement of "participation on an equitable basis" of such children. This is to be "a basis comparable to that used in providing for the participation of public school children."

In *Wheeler v. Barrera,* 417 U.S. 402 (1974) this Court upheld the aforesaid Congressional legislation and its requirements for comparable treatment and benefits for nonpublic, including church-related school children. In this connection the Court mentioned, but declined to decide concerning the constitutionality of on-premises instruction by public school teachers, observing that federal Courts do not sit to decide hypothetical cases and that "First Amendment implications may vary according to the precise contours of the plan that is formulated." *Wheeler v. Barrera,* as cited, at 426.

Meanwhile, in the New York application of Title I of the E.S.E.A., after trying various alternatives, it was found that both off-premises instruction in public schools after school hours and on-premises instruction in nonpublic schools after school hours were poorly attended and had poor results. Cost studies also demonstrated that busing nonpublic school students to public schools during school hours would cost almost half (42%) of the total budget for such students, and thus provide a lesser amount of educational services for a smaller number of students as compared to those provided for public school students. This was due not only to the greatly increased cost, but also to the loss of time involved in the transfer of students.

It was decided that the most practical and effective—perhaps the only way to provide comparable services for nonpublic school students—was to provide on-premises remedial educational services by public personnel during regular school hours. *Felton v. Secretary,* 739 F.2d 48 (1984). In formulating the New York program, careful attention was paid to prior decisions and opinions of this Court. The possible constitutionality of such a

program seemed to have been intimated in *Wheeler v. Barrera,* 417 U.S. 402 (1974) at 426, as well as by the judgment and opinion of Justice Brennan in *Nebraska State Board of Education v. Hartington,* 195 N.W.2d 161; *cert. denied,* 409 U.S. 921 (1972) at 926.

2. Denial of the constitutionality of the New York application of Title I of the E.S.E.A., in the absence of a substantial and compelling reason for such denial, would unjustly penalize constitutional rights of parents and children who use church-related schools.

a) It is unlawful to penalize the exercise of a constitutional right in the absence of a compelling governmental reason.

It is unlawful to penalize the exercise of a constitutional right without a substantial and compelling governmental reason since such penalization could inhibit or even completely frustrate the exercise of a constitutional right.

In *Thomas v. Collins,* 323 U.S. 516 (1944) this Court said: "Only the gravest abuses, endangering paramount interests, give occasion for possible limitation" of such a right as that of freedom of communication and information. The same principle would apply to freedom of education. *Thomas v. Collins,* as cited, at 530. In *Torcaso v. Watkins,* 367 U.S. 488 (1961) the same principle was maintained.

In *Speiser v. Randall,* 357 U.S. 513 (1958), in declaring unconstitutional California's denial of tax-exemptions for veterans who refused to subscribe to a loyalty oath, this Court declared that a burden—direct or indirect—may not be placed upon the exercise of a constitutional right without a compelling and substantial governmental interest. *Speiser v. Randall,* as cited, at 526-527.

In *Sherbert v. Verner,* 374 U.S. 398 (1963) this Court reaffirmed the same general principle. *Sherbert v. Verner,* as cited, at 402-403 and 406-407. In this case, which concerned a Sab-

batarian who had been denied unemployment benefits because she refused to work on Saturday, the Court added: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (Citations omitted). *Id.* at 404.

b) Denial of the comparable educational services provided by the New York application of Title I for children in church-related schools would penalize the exercise of the constitutional rights of parents and children. Parents, as has been seen, have a right under the Constitution to educate their children in church-related schools, and their children have a corresponding right to this education. These rights are based not only on personal freedoms implied by the Constitution in general, but also on the free exercise of religion and freedom of communication and information provisions of the First Amendment, as has been seen.

Parents and their children have a right to share in educational benefits accorded them by Congress based on the equal protection and equal treatment provisions of the Fourteenth Amendment. The latter requires that citizens be allowed to share equally in the benefits afforded by governmental legislation without "invidious classifications." The latter principle was applied by this Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969), when the Court struck down the requirement of one year of residency for eligibility for welfare benefits, saying that this would be "an invidious discrimination, denying them (those excluded) equal protection of the laws" and would "chill" the constitutional right of the poor and migratory to travel from state to state. *Shapiro v. Thompson,* as cited, at 627.

Denial of a comparable share in general benefits accorded to students in the case of students in church-related schools would penalize and handicap both their rights and those of their parents. It would unnecessarily deprive them of educational benefits to which they are entitled by law, and would adversely affect their present and future education as well as their future prospects. It would penalize the exercise of parental rights since

it would impede and financially penalize the parental right and obligation to educate their children, make it desirable or obligatory for them to purchase educational services which would otherwise be supplied without cost, and would also influence them to abandon their otherwise free choice of schools and send their children to public schools so that they could receive these services.

c) There is no adequate or compelling and substantial governmental interest demanding denial of participation in New York application of Title I to private school parents and their children.

The constitutional rights of parents and students favor allowance of their participation in the efficient, effective New York application of Title I of the Elementary and Secondary Education Act. These rights are important and essential for the preservation of our democratic freedoms. There are no proportionate compelling and substantial adverse reasons requiring nullification of the New York program.

The Appeals Court of the Second Circuit struck down the New York program on the basis of alleged "excessive entanglement." But it has been shown clearly that the program does not involve excessive political entanglement. Neither does the program involve excessive general or administrative entanglement. The New York application of Title I does not include or necessitate extreme surveillance of the instruction or processes of the church-related schools themselves or the latter's own teachers. The program does not threaten seriously to inhibit religion, which is the evil that avoidance of excessive general or administrative entanglement seeks to obviate. It is true that there might be some reduction of the time that could otherwise supposedly be spent in religious instruction and that there is increased contact with persons (teachers) of other persuasions. But the supposed loss of time and distracting contact would not be serious since the time would be minimal and most other teaching of alternative related secular subjects in the schools is

actually not saturated with religion to the point supposed. Due to the restrictions and supervision, the public teachers in the church-related schools would actually be less likely to inculcate their own religious views than in the public schools, where such specific restrictions and supervision are absent.

3. The rights of parents who send their children to church-related schools allow and require a considerable degree of contact and involvement between government and church-related schools.

If parents send their children to church-related schools and if government confers certain benefits on these parents and their children along with public school parents and children, contacts of government with these children and parents as well as with their freely chosen schools are necessary.

These contacts, which are caused by governmental activities, do not necessarily decrease religious freedom; rather they serve to protect it.

III. The advanced degree of socialization of elementary and secondary education in the United States requires allowance of considerable contacts and involvement between government and church-related schools if personal freedoms are to survive.

A. Socialization, or application of the principle "From each according to his means; to each according to his needs" requires allowance of considerable contacts between government and voluntary private insitutions, if the latter and the personal freedoms they represent are to survive.

In an article in the *Harvard Law Review,* Professor Gianella makes the point that increasing government subsidization and activity in various social welfare and educational fields necessitates increased contact with private organizations, including church-related ones, operating in these fields. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle,* 81 Harvard Law Review, 513 (1968).

As socialization proceeds, governmental contacts with private institutions must be allowed to increase if the private choices and personal liberties these institutions represent are to survive. This point is readily apparent if we suppose a country with more or less complete socialization, such as the Soviet Union, as does Professor Gianella. *Id,* at 522-523. Private interests and choices are expressed and implemented by voluntary social institutions, such as private hospitals, homes for the needy and aged, and schools. To the degree that public institutions are maintained and financed, while private institutions are starved and made uncompetitive, personal freedoms will wither. When government extends its activities and subsidization in social welfare and educational fields, it should also extend its subsidiary contacts with voluntary private institutions, including church-related ones or their students, Congress has done this in passing and amending the Elementary and Secondary Education Act of 1965, which New York is effectively implementing.

B. Socialization of elementary and secondary education in the United States has proceeded to the extent that it dominates this field and constitutes the leading example of a general trend to socialization.

The general level of socialization in the United States is best measured by public spending. Government expenditures on federal, state, and local levels, as a percentage of Gross National Product (GNP) equaled 37.2% of the GNP in 1978, as compared to 8% in 1902; and these expenditures will equal 50% by the year 2040 if the present growth rate continues. Expressed as a percentage of national income or personal income, public expenditures equaled 46.1% in 1978, an increase from 38.1% in 1952; and will, if they progress at the rate of recent decades, reach 50% by the end of the 1980s. Federal expenditures increased by 163% (in constant dollars) between 1952 and 1978. State and local expenditures increased by 385% in the same period, or from 7.3% to 14.3% of GNP. (Sources of information for this section are cited at the end of the section.)

There were sharp increases in governmental expenditures between 1913 and 1922, and between 1932 and 1945, primarily due to the fiscal effects of World Wars I and II. The growth rate of public expenditures since 1952 has been proceeding at a still very substantial rate. Omitting the costs of wars and national defense, all other governmental expenditures, mostly for domestic services, grew by 498% between 1952 and 1978, whereas personal consumption grew by only 153% in the same period (both in constant dollars), and population increased only 39%.

Governmental expenditures for domestic purposes grew steadily during the first half of the twentieth century, approximately doubling their share of the GNP. Then they virtually exploded. Outlays for domestic services (federal, state, and local) jumped from 38% of total governmental expenditures in 1952 (or 10.2% of GNP) to 76% in 1978 (or 24.5% of GNP). Most of the growth occurred in three functional areas: income support; health and hospitals; and education.

Total governmental expenditures for education increased from $8.4 billion in 1952 (2.4% of GNP) to $120.8 billion in 1978 (5.7% of GNP). At the federal level, expenditures for education increased from $326 million in 1952 (0.1% of GNP) to $12,574 million in 1978 (0.6% of GNP) a 1.470% increase in constant dollars. At the state and local level, expenditures for education increased from $8,247 million in 1952 (2.4% of GNP) to $116,120 million in 1978 (5.5% of GNP), a 473% increase (in constant dollars) during this period.

Education is America's largest and most ebullient growth industry, involving in 1978 thirty percent of our total population, mostly on a full-time basis — 59 million as students and 6.6 million as employees. Educational institutions in the United States expend 7.5% of the GNP compared to 4.1% in the Soviet Union. Similar ratios exist between the United States and France, West Germany, and England. All of the latter provide substantial public aid to private education, in contrast to the Soviet Union, which denies such assistance.

In the United States, most education is government-operated, and about ninety percent of students at the elementary and secondary level are enrolled at governmental institutions. About 10% of the funds for public education in the U.S. comes from the federal government. Education, which is the largest item in state-local government finance, represented 38.3% of total state-local expeditures in 1978. Employees in public education have increased by 250% from 1952 to 1978, and now constitute about 6.8% of total employment in the U.S. The average cost of public education has increased 219% in constant dollars, increasing from $301 in 1952 to $2,288 in 1978 and an estimated $3,000 in 1984.

Since its passage in 1965, the federal Elementary and Secondary Education Act (ESEA) has been supporting educational projects in about 14,000 school systems, involving 7 to 9 million children with an aggregate cost exceeding $35 billion.

Statistics in this section are derived from the following sources: The *National Income and Product Accounts of the United STates, 1929-1974,* a supplement to the *Survey of Current Business,* 1977, for 1978 (U.S. Department of Commerce, Bureau of Economic Analysis); *Survey of Current Business, National Income Issue, July 1967 - July 1979* (U.S. Department of Commerce, Bureau of Economic Analysis); *Historical Studies on* Governmental Finance and Employment, (U.S. Bureau of the Census, 1977 Census of Governments, 1979; Raymond W. Goldsmith, *A Study of Savings in the United States* (Princeton, N.J,: Princeton University Press, 1956) 2:427; *Statistical Abstract of the United Stctes 1984,* (U.S. Bureau of the Census, 1983); *Digest of Education Statistics, 1979,* (National Center for Education Statistics, 1979); *Statistical Summary of Education, 1951-52,* (U.S. Office of Education, 1955); and *The OECD Observer,* March 1979.

C. The high degree of socialization of elementary and secondary education in the United States as well as that of general socialization requires considerable contact and cooperation bet-

ween government and private, including church-related schools as well as their students to protect personal rights.

The advanced degree of socialization in the field of elementary and secondary education in the United States requires that government maintain cooperative relationships with private institutions in order to preserve personal freedoms. In virtually all other areas of governmental activity, except elementary and secondary education, such cooperative arrangements and contacts between the government and private institutions and individuals exist, with freedom of the aid recipient an important consideration.

Continued attempts to deny any form of substantial public aid to students in non-governmental schools, in spite of advancing socialization, based solely on considerations of supposed excessive entanglement between church and state, could result in the inhibition of important personal freedoms.

It has been urged that the supervision or surveillance required by the New York application of Title I, minimal as it is, would constitute excessive entanglement. It has been shown that this is not the case. Some degree of contact and cooperation between government and voluntary church-related institutions is required if progressive socialization of education is not to result in a total eclipse of personal liberties in this field. Rather than threaten freedom of religion, such limited contacts prevent its destruction.

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